BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: MARIO P., Claimant, vs. WESTSIDE REGIONAL CENTER, Service Agency.	OAH No. 2010120543

DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 25 and August 10 and 26, 2011, in Culver City.

Katie Meyer and Eva Casas-Sarmiento, attorneys at law at the Office of Clients' Rights Advocacy, Disability Rights California, represented Mario P. (claimant).[1]

Lisa Basiri, Fair Hearing Coordinator, represented Westside Regional Center (WRC or Service Agency).

Oral and documentary evidence was received. The record was held open to allow the parties to file closing briefs and reply briefs. Closing briefs were due by September 23, 2011. Claimant and Service Agency each timely filed a closing brief; claimant's closing brief was marked for identification as exhibit G and the Service Agency's closing brief was marked for identification as exhibit 16. Reply briefs were due by October 4, 2011. Claimant timely filed a reply brief, which was marked for identification as Exhibit H. The Service Agency did not file a reply brief.

The record was closed and the matter was submitted for decision on October 4, 2011.

[1] Initials and family titles are used to protect the privacy of claimant and his family.

ISSUE

Is claimant eligible to receive services from the Service Agency under the Lanterman Developmental Disabilities Services Act (Lanterman Act)?

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is an eight-year-old boy.

2. In 2005, claimant was determined to be eligible for regional center services under the Early Start Program[2] due to delays in expressive language skills. He exited Early Start at age three and transitioned to services provided through the Hawthorne School District, where he received speech and language services between the ages of three and four.

3. Claimant's parents contacted the Service Agency in early 2009 due to concerns about his difficulty in school and continued delays in language development. On February 20, 2009, Valerie Benveniste, Ph.D., evaluated claimant on behalf of the Service Agency and diagnosed him with expressive language disorder, phonological disorder, and attention and auditory processing deficits possibly indicative of a learning disability and attention-deficit/hyperactivity disorder (ADHD). On March 3, 2009, the Service Agency's eligibility review committee determined that claimant did not have a diagnosis that would make him eligible for regional center services.

4. Claimant's parents contacted the Service Agency in May 2010, submitting new information from claimant's school district and asking for reconsideration of the denial of eligibility. By letter dated May 19, 2010, Thompson Kelly, Ph.D., the Service Agency's Chief Psychologist and Director of Intake Services, wrote to inform claimant's parents that a multidisciplinary clinical team had reviewed the new information and claimant's medical record and determined that no reconsideration of eligibility was warranted. Dr. Kelly wrote that the records did not suggest mental retardation or autism, but suggested "a profile of a child with an Attention Deficit Hyperactive Disorder." He wrote that recommendations

[2] "Early Start" and the "Early Start Program" are common names for the California Early Intervention Services Act (CEISA) (Gov. Code, § 95000 et seq.), which supplements Part C of the federal Individuals with Disabilities Education Act (20 U.S.C. § 1431 et seq.). The CEISA provides that a child under three years of age who demonstrates a developmental delay is eligible for regional center early intervention services. (Cal. Gov. Code, § 95014, subd. (a); 20 U.S.C § 1432, definition (1); see also Cal. Code Regs., tit. 17, § 52020.) Early intervention services are services "designed to meet the developmental needs of each eligible infant or toddler and the needs of the family related to the infant or toddler's development." (20 U.S.C. § 1432(4)(A); Cal. Code Regs., tit. 17, § 52000, subd. (b)(12).)

found in claimant's records for medication and for individual and family therapy through a community mental health agency "appear to be valid recommendations." (Ex. 4.)

5. Nevertheless, "due to concerns regarding behavioral challenges, social difficulties and possible characteristics of autism," the Service Agency referred claimant to Mayra Mendez, Ph.D., LMFT, for the "purpose of diagnostic clarification to address the issue of Regional Center eligibility and for program planning." (Ex. C.) Dr. Mendez evaluated claimant on August 23, 2010, and prepared a Multidisciplinary Evaluation report. Dr. Mendez found that "the evidence is . . . inconsistent with regards to autistic spectrum," and recommended a social skills program, family therapy, and a parenting program.

6. The Service Agency determined that, based on Dr. Mendez's report, claimant is not eligible for regional center services.

7. By letter dated November 4, 2010, the Service Agency notified claimant's mother of its determination that claimant is not eligible for regional center services because he does not meet the criteria set forth in the Lanterman Act.

8. On December 2, 2010, claimant's father filed a fair hearing request to appeal the Service Agency's determination regarding eligibility. A hearing was originally scheduled for July 20, 2011. The date was advanced to May 17, 2011. The hearing was then continued at claimant's request and rescheduled for July 25, 2011; claimant's father waived the time limit prescribed by law for holding the hearing and for the administrative law judge to issue a decision.

Claimant's Background

9. Claimant lives at home with his parents. His primary language is Spanish.

10. Claimant attends Highland Elementary School, where he receives special education services, occupational therapy, and speech therapy.

Claimant's Evaluations for Early Start Eligibility

11. Barbara Vasser, M.S., a speech and language pathologist, evaluated claimant for eligibility for Early Start on October 15, 2005, when claimant was two years, six months old. Among other things, she found that claimant presented "with moderate to severe receptive language delays and severe expressive language delay secondary to extremely limited verbal output." (Ex. C at pp. 53-56.)

12. Ann L. Walker, Ph.D., performed a psychological evaluation of claimant two weeks later, on November 1, 2005. She applied the following test instruments, among others: Wechsler Preschool and Primary Scales of Intelligence–Third Edition (WPPSI-III), Autism Diagnostic Observational Schedule, Module 1 (ADOS, Module 1), Autism Diagnostic Inventory-Revised (ADI-R) and the Vineland Adaptive Behavior Scales–Second Edition (Vineland-2); she also conducted a clinical interview and a record review.

13. Dr. Walker diagnosed claimant with expressive language disorder and recommended speech therapy, a center-based infant stimulation program, and preschool placement.[3] She noted that claimant is able to make good eye contact, has developed appropriate peer relationships, engages in cooperative, reciprocal, interactive, and imaginary play, and does not show echolalia or repetitive motor mannerisms or restricted or stereotyped patterns of interest. She concluded that claimant "performed well within the non-autistic range on two different measures of autism. He does not meet sufficient diagnostic criteria to diagnose autism and the diagnosis of autism is not recommended." (Ex. 14.)

14. Dr. Walker obtained the following ADOS results for claimant:

Communication Total	2
Social Interaction Total	1
Communication plus Social Interaction Total	3
(*autism cut-off: 12; autism spectrum cut-off: 7*)	

15. Dr. Walker obtained the following ADI-R results:

Abnormalities in Reciprocal Social Interaction	3
(Autism cut-off: 10)	
Abnormalities in Communication	0
(Autism cut-off: 8)	
Restricted and Stereotypic Patterns of Interest	1
(Autism cut-off: 3)	

Claimant's Referral to The Guidance Center

16. Caroline Sagastume, a marriage and family therapy intern who provides clinical therapy at The Guidance Center under the supervision of a licensed therapist, testified at hearing that she has worked with claimant since October 2008, seeing him weekly. He was referred to The Guidance Center by his pediatrician "due to parents' concerns that [claimant's] language was not developing and [claimant's] hyperactive behaviors." (Ex. 12.) Claimant's parents had reported claimant being aggressive, walking in circles, and rocking. Ms. Sagastume has observed claimant engage in those behaviors; he also runs out of the room, crawls on the floor, bangs his head, tantrums, avoids eye contact,

[3] Claimant was determined to be eligible for regional center Early Start services due to expressive language delays. (See Factual Finding 2.)

misinterprets others' emotions and facial cues, rigidly follows routines, and has difficulty with transitions. Treatment at The Guidance Center has focused on improving claimant's behaviors, but no functional behavioral analysis has been performed. Ms. Sagastume diagnosed claimant with Pervasive Developmental Disorder (PDD), Not Otherwise Specified (NOS). She referred claimant to the Service Agency to rule out autism. She believes claimant is autistic and needs more intensive intervention than her agency can provide, but she is not qualified to make a diagnosis of autism.

Dr. Benveniste's 2009 Evaluation

17. For her February 2009 Psychological Assessment of claimant, Dr. Benveniste observed claimant on two occasions, one at the Service Agency offices in an exam room and in the indoor play area of the family resource center, and the other a week later at claimant's kindergarten program. The assessment was conducted bilingually. At the Service Agency, Dr. Benveniste interviewed claimant's mother, observed claimant at play, and administered the WPPSI-III, the Gilliam Autism Rating Scale–Second Edition (GARS-2), and the Vineland-2. When she visited claimant's school, Dr. Benveniste observed claimant and interviewed claimant's teacher and principal.

18. At the Service Agency's offices, Dr. Benveniste observed claimant to be verbally engaged, though with significant articulation issues. She observed him rocking frequently, but noted that he was easily corrected and that behavioral issues reported by his mother were not evident. Claimant's mother told Dr. Benveniste that claimant bangs his head, runs in circles, has bouts of "unprovoked and unrelenting laughter," and engages in unsafe behaviors and tantrums. At school, Dr. Benveniste observed that claimant was a capable math student, played well and made appropriate physical contact with other children, and exhibited language delays. Claimant's teacher told Dr. Benveniste that claimant "seldom talks, and that when he does talk his language is difficult to understand." Claimant was seated somewhat apart in class because he had behaved aggressively towards the other children. Dr. Benveniste observed claimant to be a fairly typical student "with some language issues and some impulsive behaviors." (Ex. 10.)

19. Dr. Benveniste reported that "[o]n the GARS-2 [claimant] exceeded the cutoff for clinical significance in the area of communication, and fell in the possibly range in . . . social interaction (e.g. resisting physical contact, laughing inappropriately, etcetera) and stereotyped behaviors (e.g. rocking back and forth, specific food preferences, self-injurious behaviors), yielding an unclear overall result." Further with respect to autism, Dr. Benveniste reported:

> It is the impression of this psychologist that although [claimant] clearly demonstrates significant communication issues, he does not show other significant behaviors that are suggestive of Autism Spectrum Disorder. . . . [Claimant's] social interaction, though often exuberant, appears age appropriate and

> qualitatively intact. He demonstrates a clear ability to learn and is most often cooperative, compliant and directable.

(Ex. 10.)

20. Reviewing the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) criteria for autism, Dr. Benveniste reported that claimant has no qualitative impairment in social interaction, has qualitative impairments in communication (significant delays in receptive and expressive language and an impaired ability to sustain conversation), and, according to claimant's mother's reports, engages in stereotyped patterns of behavior (head-banging). Dr. Benveniste concluded that:

> though [claimant] shows some characteristics consistent with Autism Spectrum Disorder, as at this time he does not appear to demonstrate severe and pervasive impairments in social interaction, he does not meet the criteria for Autistic Disorder at this time. Should [claimant] not progress as expected in the future, parents are encouraged to return to WRC for re-assessment.

(Ex. 10.)

21. Dr. Benveniste assessed claimant's cognitive development using the WPPSI-III. She found that claimant's "combined Full Scale I.Q. [of 83] suggests overall borderline intellectual functioning, but his high average to above average processing speed [of 116] is inconsistent with that diagnosis," and she therefore deferred an Axis II diagnosis. Mental retardation and cognitive disorders would be Axis II diagnoses.

22. Dr. Benveniste noted that, with the exception of language, claimant met his developmental milestones within normal limits. She observed that claimant is the only child in his class to require some physical separation by assignment to his own desk, that he is progressing satisfactorily in school, and that he displays manageable behaviors.

23. Dr. Benveniste diagnosed claimant with expressive language disorder and phonological disorder (moderate to severe). Still to be ruled out were mixed receptive-expressive language disorder and borderline intellectual functioning. She recommended possible psychological re-evaluation prior to claimants' entrance to second or third grade and if claimant's parents continue to have concerns about claimant's school progress, as well as speech therapy and other special education programming.

Dr. Bolinger's 2009 Consultation at The Guidance Center

24. On June 4, 2009, Todd Bolinger, M.D., at The Guidance Center, performed a psychiatric consultation and evaluated claimant for "diagnostic clarification." (Ex. 11.) Among other things, he found that claimant:

> is hyperactive, impulsive and inattentive, but also has a long history of poor social interaction, communication problems, transitioning difficulty, sensitivity to auditory and tactile stimuli, fascination with spinning, and some aggression. He was evaluated at Regional Center in February of this year but was not diagnosed with autism."

(*Ibid.*)

25. Despite that regional center evaluation, Dr. Bolinger recommended that claimant's therapist "should request psychological testing to rule out autism." He diagnosed claimant with PDD-NOS and ADHD NOS, and included in his diagnosis "Rule out Autistic Disorder." (*Ibid.*)

Dr. Kelly's May 2010 Records Review

26. In May 2010, Dr. Kelly reviewed previous evaluations of claimant performed on behalf of the Service Agency as well as newly received information from claimant's school program. He testified at hearing that, because autism is a pervasive developmental disability, one would expect to see impairment across settings, e.g., at home, in an evaluator's office, and at school. Although the records revealed that claimant demonstrated significant communication issue, at school he exhibited social reciprocity and did not demonstrate behaviors suggestive of autistic disorder, and he also worked cooperatively and displayed joint attention to tasks with his evaluators. Among other things, Dr. Kelly reviewed:

a. Ms. Vasser's October 2005 speech and language evaluation of claimant (Factual Finding 11). Ms. Vasser had observed that claimant interacted selectively, was fascinated by lights and spinning objects, and lined up toys; Dr. Kelly testified that those behaviors indicated possible autism spectrum disorder.

b. Dr. Bolinger's June 2009 report recommending a further evaluation to rule out autism. (Factual Findings 24, 25.) Dr. Bolinger observed claimant walking in a circle, avoiding eye contact, playing alone, banging his head, and flapping his hands; Dr. Kelly testified that these could be evidence of a pervasive developmental disorder.

c. Ms. Sagastume's Initial Assessment of October 2008. (Factual Finding 16.) Ms. Sagastume observed claimant knocking his head, walking in circles, ignoring his parents, tantruming, fixating on certain tasks, and engaging in repetitive motions; Dr. Kelly testified that these behaviors could be evidence of autistic spectrum disorder.

d. Dr. Walker's report of November 2005. (Factual Findings 12-15.) He testified that Dr. Walker should have referenced Ms. Vasser's observations regarding autistic-like symptoms. He testified that administering the ADI-R, WPPSI-III, ADOS, Vineland-2, and Peabody, which Dr. Walker reported having administered, should have taken between approximately six and nine hours over several sessions, whereas Dr. Walker

appears to have conducted her entire evaluation of claimant in one relatively brief session. He testified that Dr. Walker did not follow best practices in her evaluation or report.

27. Dr. Kelly testified that, for eligibility under the so-called "fifth category" of eligibility for regional center services, an individual would have to show borderline intellectual functioning. IQ scores indicating mental retardation are below 70; if the score is in the 70s, they are borderline and do not justify a diagnosis of mental retardation. But the individual may still have substantial cognitive deficits and qualify under the fifth category. Also, individuals with multiple diagnoses, e.g., PDD and borderline mental retardation, may be very disabled and like an individual with mental retardation. Such an individual would require treatment similar to that given to a person with mental retardation, such as special education placement and one-on-one assistance in class.

Dr. Mendez's 2010 Evaluation

28. Dr. Mendez is a WRC consultant primarily for the Early Start Program, but she also provides consultation to WRC for general intake at the direction of Dr. Kelly. She is a group psychotherapist and a specialist in early childhood mental health; she is not a licensed psychologist. She speaks Spanish fluently. In her August 2010 Multidisciplinary Evaluation, which Dr. Mendez conducted in order to clarify claimant's diagnostic profile, Dr. Mendez observed that claimant "did not make eye contact easily and maintained a scowling expression throughout the session. . . . [Claimant] did not demonstrate joy or desire to engage in tasks, nor was he observed to engage in shared interaction experiences with parents or this examiner." Dr. Mendez made similar observations of claimant at the Family Resource Center, where "[h]e did not look at or respond to the children who attempted to engage him" and did not make eye contact with others but engaged in solitary play. Claimant's parents reported that claimant is angry and tantrums frequently, that he is rigid and does not transition well, that he exhibits repetitive behavior patterns and rituals, and that he acts out violently against others. (Ex. 7.)

29. Dr. Mendez administered the ADOS-3 and the Vineland-II. During administration of the ADOS, claimant did not make eye contact, wandered around the room, grimaced, did not articulate words clearly, did not respond to inquiries, persistently bit his tongue, and did not demonstrate joint interactive play skills. Claimant's ADOS-3 scores were well above the cutoffs for autism. Dr. Mendez wrote, however, that "[t]he results should be interpreted with caution as the extent of his deficits and severity of symptoms do not present as consistent across all setting [*sic*] as school reports describe [claimant] as presenting with higher level social and communication skills that were not observed during this consultation." (Ex. 7.) Claimant's Vineland-II scores were in the low or below average range in all domains. Dr. Mendez wrote, however, that "[i]t is important to note that the responses provided by the parents are not consistent with the school reports of [claimant's] adaptive skills." She acknowledged at hearing, however, that the school district had never formally assessed claimant's adaptive skills, and was relying on anecdotal information.

30. Dr. Mendez diagnosis stated "R/O [Rule Out] Pervasive Development Disorder," noting parenthetically that "symptomatology is inconsistent across settings; school reports do not support PDD characteristics," and "R/O Mood Disorder, NOS." She noted in her evaluation that claimant "displayed limited social engagement and significant challenges with interactive skills . . . . He lacked interest in social exchange with others. . . . He did not visually reference others in the room and lacked age appropriate social reciprocity." She noted that, although claimant's mental health provider identified social and language deficits, claimant's school did not and had therefore determined that claimant was no longer eligible for special education services. She concluded that:

> The results of the ADOS do not provide clarity with regards to differential mental health diagnostic. Since the data base does not support social and communication deficits across settings, the evidence is thus inconsistent with regards to autistic spectrum. The data base does suggest that [claimant] has an extensive history of emotional disregulation, characteristics suggestive of mood instability and affective disorder, and significant behavioral challenges. The data base supports strengths with regards to [claimant's] academic performance and engagement with adults at school.

(Ex. 7.)

31. Dr. Mendez recommended in her report that claimant participate in a social skills program and family therapy. She testified at hearing that claimant's profile could be associated with ADHD, depression, or mood disorder, that a child with ADHD may present with symptoms similar to autism, and that ADHD and autism tend to become more easily differentiated when a child reaches the age of six or seven. She did not assess claimant for eligibility under the fifth category; determining eligibility was not the purpose of her evaluation.

Dr. Torquato's Evaluation

32. Claimant's counsel referred claimant to Shiro Perera Torquato, Ph.D., a licensed clinical psychologist, for a psychological evaluation to assess claimant's "developmental and behavioral functioning to rule out Autistic Disorder and determine whether he meets eligibility criteria for Regional Center services." (Ex. B.). Dr. Torquato conducted the evaluation on March 28, April 11, and May 2 and 6, 2011, and prepared a Psychological Assessment report.

33. Dr. Torquato observed claimant in a clinical and school setting, reviewed claimant's records, interviewed claimant's parents and classroom teacher, and administered the following instruments: ADI-R, Child Behavior Checklist–Teacher's Report Form, Sensory Processing Measure–Main Classroom Form, and GARS-2.

34. In her office examination, Dr. Torquato observed that claimant "presented as a much younger child with significant limitations in his language skills regardless of whether he was speaking English or Spanish. He also had a low frustration tolerance, engaged in multiple repetitive behaviors and lacked imaginative play that would be considered appropriate for a child his age." (Ex. B.) In the classroom, Dr. Torquato observed claimant speaking in full English sentences, primarily to the teacher, though the frequency of his verbalization was limited. Out of class she observed claimant playing with other students. Dr. Torquato spoke with claimant's teacher; claimant is in a special education class for emotionally disturbed students in kindergarten to second grade. The teacher said that claimant exhibits angry behavior and was recommended for transfer to a special day class for autistic students; he was not making the transfer immediately only because claimant's mother believed he was having success in class.

35. Dr. Torquato administered the ADI-R to claimant's parents in the presence of a translator; she testified that the ADI-R is useful at making a differential diagnosis between autism and other disorders. She obtained the following results:

Abnormalities in Reciprocal Social Interaction	26
(Autism cut-off: 10)	
Abnormalities in Communication	17
(Autism cut-off: 8)	
Restricted and Stereotypic Patterns of Interest	13
(Autism cut-off: 3)	

36. Report forms administered by Dr. Torquato to claimant's teachers indicated that claimant was not exhibiting significant behavioral or emotional problems in the classroom, but was exhibiting symptoms of a sensory integration dysfunction. The GARS-2 completed by claimant's teacher "yielded an Autism Index=94 (35^{th} percentile). This score suggests a *very likely* probability that [claimant] meets the diagnostic criteria for Autism." (Ex. B; italics in original.) The teacher noted that claimant frequently avoids eye contact, licks inedible objects, sniffs objects, and flaps his hands or fingers in front of his face or at his sides. He frequently shows no recognition that another person is present, uses toys inappropriately, and becomes upset at changes in routine. Dr. Torquato noted that these behaviors are similar to behaviors reported by claimant's parents at home, "so they are consistent across settings." (Ex. B.)

37. Dr. Torquato diagnosed claimant with autistic disorder, mixed receptive-expressive language disorder (by history), and sensory integration dysfunction (by history). She noted Dr. Mendez's ADOS findings that claimant scored above the autism cutoffs. She also noted Dr. Mendez's findings that the ADOS results were inconsistent with school reports of claimant's behaviors, but did not agree that the school records supported Dr.

Mendez's conclusions. Dr. Torquato identified school documentation and letters written by claimant's teachers discussing claimant's socially inappropriate and aggressive behaviors as well as communication delays. Dr. Torquato addressed Dr. Benveniste's observation of claimant in the classroom, citing a letter from claimant's teacher that the behavior claimant exhibited to Dr. Benveniste was not typical for claimant. The teacher wrote that claimant typically exhibits inappropriate social interactions, communications deficits, and unmanageable behaviors, and that his good behavior was a result of his knowing that he was being observed. (Ex. D, p. 100.)

38. Dr. Torquato testified as follows:

a. The criteria for autistic disorder under the DSM IV TR require six or more items from criteria category A, including at least two from category A(1) (qualitative impairment in social interaction), and one each from categories A(2) (qualitative impairments in communication) and A(3) (restricted repetitive and stereotyped patterns of behavior, interests, and activities); two from criteria category B (delays or abnormal functioning prior to the age of 3 years); and, under criterion C, the disturbance should not be better accounted for by Rett's Disorder or Childhood Disintegrative Disorder. Claimant satisfies the DSM IV TR criteria for autism, specifically A(1)(a), (b), (c), and (d); (2)(a), (c), and (d); (3)(a), (b), (c), and (d); B; and C.

b. Prior to age two, claimant had a language delay and unusual behaviors, including repetition, lack of interest in other children, tantrums, ritualistic behaviors, and feeding issues. In school from kindergarten on he has shown language delays, social deficits, significant behavioral problems, aggression, and inattention, showing symptoms of autism across multiple settings. Claimant is substantially disabled with respect to learning, expressive and receptive language, and self-direction.

c. Dr. Mendez's conclusions about claimant's adaptive functioning across settings are unreliable, because neither she nor claimant's school district formally assessed claimant for adaptive functioning. Claimant's school district missed the appropriate diagnosis of autism and failed to provide such appropriate early interventions as occupational therapy, speech therapy, social skills development, and behavioral therapy. Claimant has communications deficits not consistent with others in his special education classroom for emotionally disturbed children.

d. Although not all test results support a diagnosis of mental retardation, claimant has not functioned better than an individual with mental retardation and requires services afforded to individuals with mental retardation, such as speech therapy, home-based adaptive skills, behavioral intervention to work on self-care and dressing, feeding, daily living skills, and hygiene; he will need community living skills as well. His disability has been substantially disabling and qualifies him for regional center services under the fifth category of eligibility.

e. The ADOS and ADI-R, which showed very consistent results, as well as the GARS-2, claimant's developmental history, questionnaires completed by claimant's teachers, and clinical and classroom observations all support a diagnosis of autism.

The Service Agency's 2011 Eligibility Review of Claimant and Determination of Ineligibility

39. Dr. Kelly testified that, after reviewing Dr. Torquato's report, which diagnosed claimant with autistic disorder, the eligibility review committee again concluded that claimant is not eligible for regional center services under a diagnosis of either autistic disorder or fifth category. The committee believed that claimant's behaviors were too variable, depending on the time and location of observations, to warrant a diagnosis of autism, despite the ADI-R results, and that claimant's tantruming and negativity were more likely indicative of a mental health disorder. Dr. Kelly testified that claimant would benefit from seeing a mental health provider and from receiving special education services and behavioral supports. Dr. Kelly acknowledged that Dr. Bollinger, a mental health provider who had been treating claimant for one-and-one-half years and who had diagnosed claimant in June 2009 with ADHD and PDD-NOS, changed his diagnosis to autistic disorder, as reflected in a letter dated November 19, 2009. (Ex. E.) But, he testified, despite there being evidence of an autistic spectrum disorder or PDD-NOS, not all the evidence supports a diagnosis of autistic disorder.

Additional Testimony and Other Factual Findings

40. Claimant's mother testified that when claimant was a baby he did not look at her or smile at her when she spoke with him. He did not speak his first word until he was over two-and-one-half years old, and his speech is still difficult to understand. He has always lined up his toys; he has always smelled objects. He makes repetitive body movements, rocks back and forth, and rubs his eyes. He does not understand other people's facial expressions. He has no friends and plays only with his cousins. He lacks safety awareness and needs toileting assistance and help with grooming and dressing. Claimant's mother testified that when claimant was removed from special education class, claimant's school reported many behavioral issues to claimant's mother and frequently asked her to come to school to help them with claimant. After claimant's January 2011 IEP meeting, claimant was again placed in a special education class. After OT and ST evaluations were completed in April and May 2011, claimant's school district informed claimant's mother that claimant would be placed in a class for autistic children.

41. Claimant's mother disagreed with Dr. Benveniste's reporting that claimant did not display significant behavior issues at school; she talked to claimant's teacher, Silvia Solares, about Dr. Benveniste's conclusion. Ms. Solares wrote a letter detailing claimant's problems in the classroom. (Ex. D, p. 100.) Claimant's mother testified evaluations conducted by Drs. Walker, Benveniste, and Mendez were flawed because they did not speak Spanish well; this testimony was not persuasive. Given the apparent degree of fluency in Spanish possessed by each of them and given other testimony provided by claimant's mother, it is evident that claimant's mother may have had some difficulty understanding

technical terms used by those doctors but no difficulty communicating with them in Spanish to a degree that would call into question the validity of their results.

42. Claimant's father testified that he and his wife take claimant to the park, where claimant runs a great deal but does not play with other children. He likes to write and to draw, but only about animals. Claimant sleeps with his mother, and has always done so. He lacks safety awareness and elopes, and needs assistance dressing. Claimant's father wants claimant to receive regional center services because he wants claimant to be capable and independent and to have the opportunity to develop and lead a healthy life.

43. In questioning the validity of claimant's recent diagnosis of autism by Dr. Torquato, the Service Agency points out that the Service Agency's recent assessments conclude that claimant does not have autism and that teachers told Dr. Benveniste and then Dr. Mendez that claimant's behavior in school was manageable; Drs. Benveniste and Mendez both observed claimant at school behaving in a manner inconsistent with a diagnosis of autism.

44. There is persuasive evidence that claimant satisfies the DSM IV TR criteria for autistic disorder. The ADI-R and GARS-2 administered by Dr. Torquato, the ADOS administered by Dr. Mendez, communications from claimant's teachers, and the school district's actions together support a diagnosis of autism. They outweigh the findings of Drs. Mendez and Benveniste that claimant's behaviors at school are inconsistent with such a diagnosis, particularly as those findings are challenged by teacher reports and school district actions regarding claimant's placement. Claimant's school district believes it appropriate to place claimant in a special education class for autistic children. Though the district's definition of autism is broader than that required for regional center services and supports, the district's recommendation does call into question the conclusions of Drs. Benveniste and Mendez that claimant does not present with autism in different settings. Rather, it supports the conclusion that claimant frequently demonstrates behaviors at school that are consistent with the autistic-like behaviors that claimant's parents' report take place in the home. Whether symptoms of claimant's other disabilities diagnosed by Drs. Benveniste and Mendez may overlap with those of claimant's autism, or whether claimant has been misdiagnosed with respect to some of those other disabilities, the weight of the evidence establishes that claimant has autistic disorder, that autism has constituted a substantial disability for claimant, and that the condition will continue indefinitely.

45. The evidence presents a closer case on the issue of claimant's eligibility for regional center services under the fifth category. That issue need not be reached here in light of the finding that claimant is eligible for services due to his autistic disorder.

LEGAL CONCLUSIONS

1. Cause exists to grant claimant's request for regional center services, as set forth in Factual Findings 1 through 46, and Legal Conclusions 2 through 4.

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, claimant bears the burden of proving, by a preponderance of the evidence, that he is eligible for government benefits or services. (*See* Evid. Code, § 115.)

3. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.) To establish eligibility for regional center services under the Lanterman Act, claimant must show that he suffers from a developmental disability that "originate[d] before [he] attain[ed] 18 years old, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for [him]." (Welf. & Inst. Code, § 4512, subd. (a).) "Developmental disability" is defined to include mental retardation, cerebral palsy, epilepsy, autism, and "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature." (*Id*.)

4. Claimant established by a preponderance of the evidence that he has a qualifying diagnosis of autism. (Factual Findings 11-44.)

ORDER

Claimant Mario P.'s appeal is granted; Westside Regional Center's decision denying claimant's request for regional center services is reversed.

DATE: November 22, 2011

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HOWARD W. COHEN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.